

## NESTLE PRODUCTS SDN BHD

A

v.

## MAHKAMAH PERUSAHAAN MALAYSIA &amp; ANOR

HIGH COURT MALAYA, PULAU PINANG

B

ZAKARIA SAM J

[JUDICIAL REVIEW NO: 25-42-03-2012]

10 JUNE 2013

**ADMINISTRATIVE LAW:** *Judicial review - Application to quash award of Industrial Court - Dismissal on grounds of insubordination - Failure to comply with order for transfer - Whether order for transfer done in bad faith - Whether transfer detrimental to terms of employment*

C

**LABOUR LAW:** *Industrial Court - Award - Application to quash award of Industrial Court - Failure to comply with order for transfer - Dismissal on grounds of insubordination - Whether order for transfer within applicant's managerial prerogative - Whether Industrial Court committed error of law warranting High Court's interference*

D

The applicant, by way of judicial review application, sought to challenge the decision of the first respondent ('the Industrial Court') in granting the second respondent backwages and compensation *in lieu* of reinstatement for being dismissed without just cause or excuse. The second respondent was found guilty by a domestic inquiry due to his refusal to go on transfer from the Penang branch to the Kuantan branch ('the transfer') and was subsequently dismissed on grounds of insubordination. The issues that arose for determination were, *inter alia*: (i) whether the transfer was done in bad faith; (ii) whether the decision to transfer was within the scope of the applicant's managerial prerogative; (iii) whether the transfer was detrimental to the second respondent's terms of employment; and (iv) whether the Industrial Court had committed an error of law which warranted the High Court's interference.

E

F

G

**Held (allowing application with costs):**

H

(1) The applicant had produced evidence that the transfer was for genuine business reasons. There was a need to transfer the second respondent to the Kuantan branch to utilise his experience and develop the branch. For that reason, the act of transferring the second respondent was *bona fide* and his persistent refusal to comply with the transfer constituted an

I

- A      act of insubordination. Moreover, the second respondent's refusal and failure to comply with the applicant's transfer was a wilful disobedience to a lawful and reasonable order. (paras 17, 19, 27 & 40)
- B      (2) There was no obligation on the part of an employer to consult an employee prior to his transfer. Although an employee who is dissatisfied with the transfer order may lodge an appeal, such an action by itself does not negate the transfer order and excuse the employee from complying with the order. Hence,
- C      the decision to transfer the second respondent was well within the scope of the applicant's managerial prerogative. (paras 22, 25 & 38 )
- D      (3) The findings of the Industrial Court that the transfer was detrimental to the second respondent's terms and conditions of employment were without basis since it had nothing to do with the second respondent's terms and conditions of employment with the applicant. It is inevitable that some inconvenience may be caused when one is required to move from one place to another. Entailed inconvenience is a normal
- E      consequence of any relocation as long as no proof of *mala fide* or improper motive is shown (*Loh Siew Kim v. Menteri Sumber Manusia Malaysia & Anor*; *refd*). (paras 11, 32, 33 & 34)
- F      (4) The Industrial Court had arrived at erroneous findings or acted on evidence which had no probative value and had not relied on material documents and evidence adduced before it. It had committed several errors of fact and law which warranted interference. It had failed, *inter alia*, to apply the correct principles of industrial law and jurisprudence, had applied the
- G      wrong tests and had taken into account irrelevant considerations. Hence, the award of the Industrial Court was irrational in the *Wednesbury's* sense. (paras 37 & 42)

**Case(s) referred to:**

- H      *Afifah Yaakob v. Cosmopoint Sdn Bhd* [2009] 3 ILR 653 (*refd*)  
         *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 CA (*refd*)  
         *Balakrishnan Krishnasamy v. Western Digital (M) Sdn Bhd & Anor* [1999] 1 LNS 282 HC (*refd*)
- I      *Booi Kim Lee v. Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121 HC (*refd*)  
         *Chan Sow Lan v. Jurutera Konsultant (Semenanjung) Sdn Bhd* [2011] 2 LNS 1563 (*refd*)

- Chinniah Sundram v. Pioneer Sun-Mix (SMC) Sdn Bhd* [2009] 2 LNS 1293 (**refd**) A
- George Town Holdings Berhad v. Chan Wang Tak* [1997] 3 ILR 935 (**refd**)
- Hariato Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2011] 5 CLJ 188 HC (**refd**)
- Ikeda IOM Holdings (M) Sdn Bhd v. Gan Poh Jin* [1995] 1 ILR 297 (**refd**) B
- Ladang Holyrood v. Ayasamy Manikam & Ors* [2004] 2 CLJ 697 CA (**refd**)
- Loh Siew Kim v. Menteri Sumber Manusia Malaysia & Anor* [2010] 1 LNS 558 HC (**refd**)
- Malaysia Airports Bhd v. Abdillan Bujang & Anor* [2000] 2 ILR 65 (**refd**)
- Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181 FC (**refd**) C
- Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 FC (**refd**)
- Saiful Bahari Abdul Rashid v. Menara Kuala Lumpur Sdn Bhd* [2012] 2 LNS 0324 (**refd**)
- Selvarani M Narayanasamy v. Nittsu Transport Service (M) Sdn Bhd* [2009] 4 ILR 524 (**refd**) D
- Shahabudin Abdul Rashid v. Talasco Insurance Sdn Bhd* [2004] 4 CLJ 514 CA (**refd**)
- Shanker Kanavel v. Sun Media Corporation* [2003] 3 ILR 141 (**refd**)
- Tenaga Insurance Bhd v. Chea Lee Sang* [2002] 2 ILR 154 (**refd**) E
- TN Machinery & Equipment (KL) Sdn Bhd & Ors v. Choong Loong Wun* [2011] 2 LNS 1600 (**refd**)

#### Legislation referred to:

Industrial Relations Act 1967, s. 13

*For the applicants - Lim Heng Sang; M/s Lee Hishamuddin Allen & Gledhill*  
*For the 2nd respondent - P Jeevaretnam; M/s Jeevaretnam & Co*

*Reported by Shah Saharudin*

## JUDGMENT

### Zakaria Sam J:

[1] This application for judicial review is in respect of the award handed down by the first respondent (R1) in relation to the dispute between the applicant and the second respondent (R2) on the issue of R2's dismissal by the applicant.

**A    Brief Factual Matrix**

**B**    [2] By a letter dated 30 November 2004, R2 who was holding the position of sales representative grade 1, was transferred from the applicant's Penang branch to Kuantan branch, sales division based in Kuala Terengganu with effect from 1 January 2005. R2 however, submitted several appeal letters appealing against the transfer order, citing amongst others, his medical condition. The applicant had duly responded to all of R2's appeals explaining to him that the transfer has come about to provide opportunity for exposure and development. Furthermore, the applicant has explained that with R2's contribution over the years, the applicant believes that he has the potential for further growth and the experience and capability to add value in the East Coast area. With regard to his medical condition, the applicant also clarified that the pace of life in Kuala Terengganu is moderate and that any medical care and ongoing medication, if needed, is available throughout the country and in the East Coast.

**E**    [3] Due to R2's failure to report for duty on 3 January 2005 and later on 5 January 2005, he was required to attend a domestic inquiry on 20 January 2005 to answer two charges levelled against him:

Charge 1:

**F**    That you have on 3rd and 5th January 2005 in failing to comply with the Company's lawful instruction to proceed on transfer, committed an act of insubordination.

Charge 2:

**G**    That you have in the course of attempting to avoid the transfer abused the Grievance Procedure process as contained in Article 9 of the NPC/NUCW 2001-2003 Collective Agreement (which is now superseded by the NPC/NUCW 2004 - 2006 Collective Agreement which is pending cognition by the Industrial Court.

**H**    [4] The panel of the domestic inquiry found R2 guilty of both charges. R2 was however given another chance to report for duty on 2 February 2005 despite the finding of guilty by the panel of domestic inquiry.

**I**

[5] R2 failed to report for duty on 2 February 2005 and his employment was subsequently terminated by the applicant by a letter dated 2 February 2005 on the ground of insubordination and that his action constitutes a repudiatory breach of his contract of employment.

A

### The Award Of R1

B

[6] In the award, R1 held that the dismissal of R2 on account of his refusal to go on transfer from the Penang branch to the Kuantan branch to be based in Kuala Terengganu was without just cause or excuse.

C

[7] R1 proceeded to award monetary compensation in the sum of RM132,840.40 as follow:

- (a) Backwages from the date of dismissal to the last date of hearing in the sum of RM53,390.40 (RM3,178 x 24 with a deduction of 30%); and
- (b) Compensation *in lieu* of reinstatement (one month salary for each completed year of service from 2 June 1980 till 2 February 2005) in the sum of RM79,450 (RM3,178 x 25).

D

E

[8] However, in arriving at the award of compensation the learned chairman of R1 deducted 30% of the backwages on account of 'misconduct' of R2.

F

### The Law

[9] It is trite law that the High Court will quash the decision of the Industrial Court if in the course of coming to its decision the Industrial Court has committed an error of law, when it committed procedural impropriety, illegality or irrationality: *Booi Kim Lee v. Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121.

G

[10] Findings of facts based purely on the credibility of witness may not be challenged in judicial reviews; however, it is established law that:

H

- (i) reliance upon erroneous factual conclusion; or
- (ii) conclusion which are not supported by evidences;
- (iii) decision is not supported by facts; or

I

- A (iv) the findings have been reached by talking into account irrelevant consideration; or
- (v) not taking account relevant consideration
- B are subject to judicial review: *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629.
- [11] The law on the transfer of a workman is well settled:
- C (i) Transfer of a worker is a managerial prerogative which can be excuted *bona fide* in the interest of the employer's business:
- Ladang Holyrood v. Ayasamy Manikam & Ors* [2004] 2 CLJ 697;
- D *Ikeda IOM Holdings (M) Sdn Bhd v. Gan Poh Jin* [1995] 1 ILR 297; and
- Saiful Bahari Abdul Rashid v. Menara Kuala Lumpur Sdn Bhd* [2012] 2 LNS 0324.
- E (ii) Managerial prerogative to transfer, *prima facie* valid unless vitiated by proof of *mala fide*. The burden of proof lies on the workman alleging victimisation:
- F *Shanker Kanavel v. Sun Media Corporation* [2003] 3 ILR 141; *Hariato Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2011] 5 CLJ 188; *Balakrishnan Krishnasamy v. Western Digital (M) Sdn Bhd & Anor* [1999] 1 LNS 282; [1999] MLJU 437.
- G (iii) The burden of proof on the allegation of *mala fide* lies on the workman alleging victimisation etc,:
- Shanker Kanavel (supra)*;
- Hariato Effendy Zakaria & Ors (supra)*; and
- H *Balakrishnan Krishnasamy (supra)*.
- I (iv) Nature and quality of proof of victimisation required positive proof on balance of probabilities: *Ranjit Kaur S Gopal Singh (supra)*. It must be proved that the order of transfer was *mala fide* or was a measure of victimisation or unfair labour practice. There should be concrete materials which should be unimpeachable in character: *Shanker Kanavel (supra)*.

- (v) Wilful refusal to proceed on transfer instruction is insubordination which warrant dismissal: **A**
- Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181;
- Chan Sow Lan v. Jurutera Konsultant (Semenanjung) Sdn Bhd* [2011] 2 LNS 1563; **B**
- TN Machinery & Equipment (KL) Sdn Bhd & Ors v. Choong Loong Wun* [2011] 2 LNS 1600; **C**
- Chinniah Sundram v. Pioneer Sun-Mix (SMC) Sdn Bhd* [2009] 2 LNS 1293. **C**
- (vi) Transfer can be effected so long as there is no change to terms and conditions of service: **D**
- Shahabudin Abdul Rashid v. Talasco Insurance Sdn Bhd* [2004] 4 CLJ 514; and
- Selvarani M Narayanasamy v. Nittsu Transport Service (M) Sdn Bhd* [2009] 4 ILR 524. **E**
- (vii) The nature of the disadvantage or detriment would impugn a transfer directive must pertain to the terms and conditions of employment of a transferred employee and to matters which affect the preference or the wishes of the employee. Entailed inconvenience is a normal consequence of any relocation as long as no proof of *mala fide* or improper motive: *Loh Siew Kim v. Menteri Sumber Manusia Malaysia & Anor* [2010] 1 LNS 558. **F**
- (viii) Appeal against transfer do not excuse an employee from complying with the transfer order: **G**
- Malaysia Airports Bhd v. Abdillah Bujang & Anor* [2000] 2 ILR 65; and
- Tenaga Insurance Bhd v. Chea Lee Sang* [2002] 2 ILR 154. **H**
- (ix) No obligation or requirement on the part of the employer to consult with employee prior to a transfer: **I**
- Afizah Yaakob v. Cosmopoint Sdn Bhd* [2009] 3 ILR 653; and
- George Town Holdings Berhad v. Chan Wang Tak* [1997] 3 ILR 935.

**A Findings**

[12] Based on the above law stated, I will now deliberate on the judgment of R1.

**B** [13] It is R2's case that his transfer was done in bad faith was premised on para. 26 of the statement of case which states as follows:

**C**        The Claimant (R2 herein) contends and avers that the Company was motivated by malice and its action was *mala fide* when decided to transfer contrary to the terms of employment without at all discussing with/consulting him. The Claimant too contends that the Company was unhappy with the Claimant's active involvement in trade union activities during his tenure in Penang (p. 5 of the Applicant's Affidavit).

**D** [14] In his witness statement R2 made no reference at all to any alleged victimisation due to his union activities.

**E** [15] The only purported evidence of *mala fide* due to victimisation is R2's bare assertion of the applicant's unhappiness with him for being a vocal negotiation and his perception of his superior's body language. There is also the reference to some unnamed staff to whom COW2 purportedly mentioned that R2 was championing the workers right. However this alleged statement of COW2 was never put to COW2 in the cross-examination.

**F** [16] These are merely bare assertions which do not count as probative evidence to constitute proof of *mala fide*.

**G** [17] The applicant on the other hand had produced evidence through COW1 and COW3 that the transfer was for genuine business reasons, ie, the Kuantan branch was expanding and needed an experience person to handle and manage the said expansion. R2 was recommended by the Penang branch manager as he was of the opinion that R2 had the necessary experience and he was a good performer. These testimonies were never  
**H** challenged.

**I** [18] R2's case of victimisation was never put to the applicant's witnesses. It is essential that a partly case be expressly put to the opponent material witnesses when they are under cross-examination: *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639.

- [19] The above evidence adduced by the applicant during the proceedings before R1 shows that there was indeed a need to transfer R2 to the Kuantan branch for the need to utilise R2's experience and develop the said branch. The transfer was for *bona fide* reason. A
- [20] R1 clearly had not taken into account the reasons given by the applicants and to properly evaluate the same and the flimsy evidence of R2 before arriving at the unsubstantiated conclusion that the transfer was not *bona fide*. R1's decision is clearly flawed. B
- [21] R2 also alleges that the applicant was motivated by malice and its action was *mala fide* when it decided to transfer him contrary to the term of employment without at all discussing with him or consulting him. C
- [22] I am of the view that there is no obligation on the part of an employer to consult an employee prior to transfer him. It is noted that R1 did not make any adverse finding on this issue against the applicant, in his award. Clearly therefore, R2 has failed to prove *mala fide* on this alleged ground. D
- [23] R1 also held that R2 did not outrightly refuse to go on transfer but was still appealing to the applicant to reconsider its decision. E
- [24] Clearly, R1 had taken into account irrelevant consideration. F
- [25] While an employee who was dissatisfied with a transfer order may lodge appeal, such action does not in itself negate the transfer order and excuse the employee from complying with the order. G
- [26] The applicant had considered the appeal and decided R2 had to go on transfer. R2 is therefore obliged to comply with the transfer order. G
- [27] R2's failure to comply with the applicant's transfer order and his refusal, was a wilful disobedience to a lawful and reasonable order. H
- [28] R1 also held that the transfer of R2 was a detriment to his term of employment. R1 held that R2 was referred to as sales representative, a grade below the position of key accounts sales representative (KASR), his position prior to the transfer. I

- A [29] During the trial, evidence was adduced through COW3 to show that there was no change to the conditions of employment as can be seen at Q & A No: 21 at p. 86 of the applicant's affidavit.
- B Q : Was the Claimant's position on transfer to the Kuantan branch as a Sales Representative Grade 1 a demotion from his position at the Penang branch as Key Accounts Sales Representative?
- C A : No, it was not. Essentially, a Key Accounts Sales Representative is a Sales Representative. In both branches, the Claimant was a Grade 1 Sales Representative, that being the case the claimant would still be in the same grade and enjoy the same salary and benefits.
- D [30] Even the terms in the transfer letter states that R2 'to assume the same position of sales representative grade 1' - (see letter dated 30 November 2000 at p. 106 of the applicant's affidavit).
- E [31] No evidence was adduced before R1 to indicate that sales representative grade 1 was a grade below KASR. In fact, R2 admitted during cross-examination that none in his appeal letters did he mention that he was demoted or transferred to a grade below. Clearly this was an afterthought on the part of R2. Evidently R1 has taken into account irrelevant considerations in deciding that the act of transferring R2 was *mala fide*.
- F [32] The reasons of appeal by R2, ie, his personal problem, family reason and health reason to reconsider the transfer were personal in nature and are matters which the applicant had addressed. These reasons had nothing to do with his terms and conditions of employment with the applicant.
- G [33] R1's finding that the transfer was a detriment to R2's terms and conditions of employment is, without basis.
- H [34] It is inevitable that some inconvenience may be caused when one is required to move from one place to another. An employer should take into account these factors. However this consideration must be balance against an employer's right to manage its business.
- I [35] In the absence of any proof of *mala fide* or improper motive on the applicant's part, failure by R2 to comply with the transfer order is tantamount to insubordination which may warrant a dismissal.

**Conclusion****A**

[36] The various matters stated above not only constitute the grounds for challenging R1's award on the grounds of illegality but also constitutes unlawfulness on the ground of irrationality.

**B**

[37] R1 had arrived at erroneous findings or acted on evidence which had no probative value and not relied on material documents and evidence adduced before it, in finding that the act of transferring R2 was *mala fide* hence the dismissal is without just cause or excuse.

**C**

[38] On the totality of the facts and circumstances, the applicant's decision to transfer R2 was well within the scope of the applicant's managerial prerogative to transfer.

**D**

[39] The transfer exercise was carried out for a valid reason in the interest of the company's business. R2 had been selected because he had the experience and sensitivity to ensure the successful completion of the project. Further, he was not placed in any disadvantaged position as a result of the transfer.

**E**

[40] The act of transferring R2 to the Kuantan branch was *bona fide* and his persistent refusal to comply with the transfer order constitutes an act of insubordination.

**F**

[41] Furthermore, s. 13 of the Industrial Relations Act 1967 also recognises the prerogative of an employer to transfer an employee without any change detrimental to the terms of employment and R1 had failed to consider the objective and policies of the Act.

**G**

[42] It is plain that the R1 had committed several errors of fact and law which warrants interference by this court. R1 had failed to, amongst others, apply the correct principles of industrial law and jurisprudence pertaining to the applicant's exercise of managerial prerogative to transfer, applied the wrong tests, had taken into account irrelevant considerations and failed to take into account relevant consideration. The R1's award can be characterised as one which is irrational in the *Wednesbury's* sense.

**H**

[43] Based on the forgoing reasons the applicant's application was allowed with the costs of RM2,000.

**I**